IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 6, 2007 Session

MALIBU EQUESTRIAN ESTATE, INC., ET AL. v. SEQUATCHIE CONCRETE SERVICE, INC.

Direct Appeal from the Circuit Court for Giles County
No. CC-10746 Jim T. Hamilton, Judge

No. M2005-02954-COA-R3-CV - Filed on July 30, 2007

This case involves a dispute between a seller and a buyer of concrete. The seller delivered the materials to the buyer's property, and the seller received a check to cover the price of the materials delivered. The buyer stopped payment on the check because it claimed that the seller's concrete truck damaged a bridge on the buyer's property. The buyer filed suit against the seller for negligence and other claims, and the seller counterclaimed for breach of contract and other claims. The trial court entered directed verdicts on all claims except for negligence and breach of contract. A jury returned a verdict in favor of the seller on both claims, finding no negligence on the seller's part, and finding that the buyer had breached the contract. The buyer appealed, challenging various aspects of the jury instructions and the verdict form, and the buyer also challenged the evidentiary basis for the amount of attorney's fees awarded to the seller. For the following reasons, we affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Kim B. Tycer, Pulaski, TN, for Appellants

Alaric A. Henry, Amanda G. Branam, Chattanooga, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

Malibu Equestrian Estate, Inc. ("Malibu" or "Plaintiff") conducts business as Greystone Equestrian Center in Lynnville, Tennessee. John Shart ("Plaintiff") is the president of Malibu and an owner of the real property where the equestrian center is located.

Malibu entered into an agreement with Sequatchie Concrete Service, Inc. ("Sequatchie Concrete" or "Defendant") for the purchase and delivery of concrete to the equestrian center. When Sequatchie Concrete made the delivery, its cement truck allegedly damaged a bridge located on Plaintiffs' property. Plaintiffs had tendered a check in the amount of $11,776.06 to Sequatchie Concrete in order to receive the concrete deliveries, but they stopped payment on the check because Sequatchie Concrete denied responsibility for any damage to the bridge.

Plaintiffs filed this lawsuit in the Circuit Court for Giles County claiming that Sequatchie Concrete negligently damaged the bridge, and they also alleged gross negligence, misrepresentation, defamation, and violations of the Tennessee Consumer Protection Act, T.C.A. § 47-18-101, *et seq.* Sequatchie Concrete counterclaimed for breach of contract, fraud, and harassment. In addition to seeking the original price of $11,776.06 for the delivered concrete, Sequatchie Concrete sought attorney's fees and contractual interest of 18% as provided for on the job tickets that had been provided with each delivery.

The case was tried before a jury on August 31 and September 1, 2005. Plaintiffs voluntarily dismissed their defamation claim. The trial court entered directed verdicts on all of the remaining claims except for Plaintiffs' ordinary negligence count and Sequatchie Concrete's claim for breach of contract. The jury returned a verdict finding that Sequatchie Concrete was not liable to Plaintiffs for negligence, but it found that Plaintiffs were liable to Sequatchie Concrete for breaching the contract. Accordingly, the trial court entered judgment for Sequatchie Concrete in the amount of $18,883.85.

After filing numerous post-trial motions, Plaintiffs filed their notice of appeal to this Court on December 21, 2005.

II. ISSUES PRESENTED

Appellants have timely filed a notice of appeal and present the following issues, as we perceive them, for review:

1. Whether the trial court erred by using jury instructions that were inaccurate and erroneous;
2. Whether the trial court erred by using a verdict form that was deficient, ambiguous, and inaccurate, and in failing to require the jury to clarify its verdict; and

3. Whether the trial court erred by not allowing counsel to review the written jury instructions and verdict form, thereby denying Plaintiffs the opportunity to make timely objections.

For the following reasons, we affirm the decision of the circuit court.

III. STANDARD OF REVIEW

On appeal, we review a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

A. Jury Instructions and Verdict Form

Plaintiffs' first two issues allege that the jury instructions and verdict form were deficient, inaccurate, and ambiguous. In their brief, they extensively discuss the details of the verdict form and the jury instructions and how certain parts were allegedly erroneous. Sequatchie Concrete contends that the verdict form and instructions were accurate. Additionally, Sequatchie Concrete asserts that Appellants have waived these issues on appeal because the alleged errors were not specifically set forth in Appellants' motion for new trial. Relevant to these issues, the motion for new trial merely stated that the verdict and judgment were "predicated upon . . . errors in jury instructions used, granted and refused, and errors in the verdict forms used, granted and refused . . . ."

It has long been the rule in Tennessee that in order to preserve errors for appeal, the appellant must first bring the alleged errors to the attention of the trial court in a motion for a new trial. ***Fahey v. Eldridge***, 46 S.W.3d 138, 141 (Tenn. 2001). Initially, the rule was imposed to make the process of reviewing "the ever increasing number of appeals" more efficient by limiting and defining the issues for our review. ***Id.*** at 141-42. More importantly, the motion for new trial ensures that a trial judge "might be given an opportunity to consider or to reconsider alleged errors committed during the course of the trial or other matters affecting the jury or the verdict . . . ." ***Id.*** at 142 (quoting *McCormic v. Smith*, 659 S.W.2d 804, 806 (Tenn. 1983)). We have described the purposes of the rule as "allow[ing] the trial court to rectify any errors that might have been made at trial and to avoid 'appeal ambush.'" ***Mitchell v. Davis***, No. 03A019409CH-00317, 1995 WL 546928, at *2 (Tenn. Ct. App. W.S. Sept. 15, 1995). Rule 3(e) of the Tennessee Rules of Appellate Procedure now governs the issue, and it provides in part:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, *jury instructions granted or refused*, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the

> same was *specifically stated* in a motion for a new trial; otherwise such issues will be treated as waived.[1]

(emphasis added). Although Rule 3(e) states that grounds must be "specifically stated" in a motion for new trial, it does not address the degree of specificity that is required. ***Fahey***, 46 S.W.3d at 142. The standard for specificity has been described as being "as specific and certain as the nature of the error complained of will permit." ***Id.*** (quoting *Memphis St. Ry. Co. v. Johnson*, 114 Tenn. 632, 643, 88 S.W. 169, 170 (1905)).

Recently, the Tennessee Supreme Court set out several principles that were evident from case law regarding the degree of specificity needed in a motion for new trial in order to properly preserve issues for appeal. ***Fahey***, 46 S.W.3d at 142. First, the motion for new trial should contain a concise factual statement of the error, "sufficient to direct the attention of the court and the prevailing party to it." ***Id.*** (quoting *Johnson*, 114 Tenn. at 644, 88 S.W. at 170-71). Specifically, the Court stated that "it is clearly improper to simply allege, in general terms, that the trial court committed error" by taking some action. ***Id.*** Rather, the motion should identify the specific circumstances giving rise to the alleged error so that it may be reasonably identified in the context of the entire trial. ***Id.*** at 142-43. "[A] well-drafted motion alleging error in the jury instructions should set forth the language of the instruction given by the court and the language of the instruction rejected by the court if an alternative instruction was requested." ***Id.*** at 143. Second, because it is well-settled that a general objection is usually not sufficient to assign error, the motion should contain a specific legal ground for the alleged error with "some articulation of why the court erred in taking such actions." ***Id.*** at 143, 146. Finally, appellate courts should view motions for a new trial in the light most favorable to the appellant, resolving any doubt in favor of preserving the issue to avoid needlessly favoring "technicality in form" over substance. ***Id.*** at 143. Still, "courts cannot find error where none has actually been alleged, no matter how liberal a construction is given to the motion." ***Id.***

As examples of general, improper motions for a new trial, the ***Fahey*** Court cited two cases involving motions similar to the one in this case. 46 S.W.3d at 142, n.6. In ***State v. Gauldin***, 737 S.W.2d 795, 798 (Tenn. Crim. App. 1987), the motion for new trial simply stated that the "instructions given by the court to the jury were unclear and confusing," without further elaboration. On appeal, the court treated the issue as waived because the issues were not specifically stated as required by Rule 3(e). ***Id.*** In ***Loeffler v. Kjellgren***, 884 S.W.2d 463, 472 (Tenn. Ct. App. 1994), the motion for new trial stated that "[t]he trial court erred in jury instructions," without specifying which portions of the instructions were objectionable. The Court of Appeals held that "Rule 3(e) requires an appellant to specify in his motion for new trial the particular portions of the jury instructions from which he complains." ***Id.*** (citing *State v. King*, 662 S.W.2d 77, 79 (Tenn. Crim. App. 1981)).

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[1] A party may challenge an instruction as inaccurate in a motion for a new trial, even if it did not object to the instruction at trial. ***Grandstaff v. Hawks***, 36 S.W.3d 482, 489 (Tenn. Ct. App. 2000) (citing Tenn. R. Civ. P. 51.02). By raising the issue in the motion for new trial, it is preserved for appeal. ***Id.*** However, a party is not relieved of the responsibility to bring material *omissions* in the jury instructions to the trial court's attention by way of a timely objection. ***Id.*** at 489, n.9.

In another similar case, ***Boyd v. Hicks***, 774 S.W.2d 622, 625 (Tenn. Ct. App. 1989), the appellants mentioned only one paragraph of the jury instructions in their motion for new trial, then attempted to challenge other portions of the instructions in their brief on appeal. The Court of Appeals determined that any arguments concerning the portions of the instructions not cited in the motion for new trial must be considered waived. ***Id.*** Accordingly, the Court limited its review to the errors involving the only paragraph included in the motion for new trial. ***Id.*** *See also* ***Mitchell v. Davis***, No. 03A019409CH-00317, 1995 WL 546928, at *1 (Tenn. Ct. App. W.S. Sept. 15, 1995) (motion for new trial must set forth the "specific objectionable portions of such instructions" in order to preserve issue for appeal).

Applying these principles to the case at bar, Plaintiffs' motion for new trial alleging "errors in jury instructions used, granted and refused" clearly lacks the specificity required to preserve these issues for appeal. There are no facts presented to identify any specific errors, and no legal grounds were stated as the basis for the errors. Although we recognize that motions for a new trial should be reviewed in a light favorable to preserving the issues, we "cannot create an error where none has been legitimately preserved." *See* ***Fahey***, 46 S.W.3d at 146. The substance of this motion is lacking, not merely its technical form.

Regarding the challenges to the verdict form, specifically, an appellant's "[f]ailure to make a timely objection to a verdict form constitutes a waiver of the objection." ***Keith v. Murfreesboro Livestock Mkt., Inc.***, 780 S.W.2d 751, 759 (Tenn. Ct. App. 1989). We find no objection in the record made by Plaintiffs concerning the verdict form. Still, Rule 3(e) has been interpreted to encompass alleged errors in verdict forms, so that if the issue had been properly raised in the motion for new trial, it would still be preserved for appeal. ***Rolen v. Wood Presbyterian Home, Inc.***, 174 S.W.3d 158, 161 (Tenn. Ct. App. 2005); *see also* ***Nepp v. Hart***, No. M2005-2024-COA-R3-CV, 2006 WL 2582503, at *6 (Tenn. Ct. App. W.S. Sept. 7, 2006); ***State v. Wilson***, No. W2002-02832-CCA-R3-CD, 2003 WL 22080784, at *4 (Tenn. Crim. App. Sept. 2, 2003); ***Sanders v. Lincoln County***, No. M2000-01386-COA-R3-CV, 2001 WL 912735, at *4 (Tenn. Ct. App. Aug. 14, 2001); ***State v. Nolan***, No. 01C01-9511-CC-00387, 1997 WL 351142, at *11 (Tenn. Crim. App. Jun. 26, 1997); ***State v. Kennedy***, No. 01C01-9601-CC-00038, 1997 WL 137426, at *3-*4 (Tenn. Crim. App. Mar. 27, 1997); ***Baxter v. Vandenheovel***, 686 S.W.2d 908, 910 (Tenn. Ct. App. 1984). However, for the reasons previously discussed, the Plaintiff's motion for new trial simply alleging "errors in the verdict forms used, granted and refused" was not sufficient to preserve the issue for appeal.

At oral argument, Plaintiffs' counsel acknowledged the deficiencies in her "very brief" motion for new trial, but she asks this Court to consider the odd procedural events taking place after the trial. The trial concluded, and the jury returned its verdict, on September 1, 2005. The trial court entered its judgment order on the jury verdict on September 19, 2005, however, Plaintiffs' counsel claimed that she did not immediately receive a copy of the order, and there is no certificate of service attached to the order. Upon learning of the final judgment, Plaintiffs' counsel filed a motion to amend the judgment order on October 3, 2005. The trial court held a hearing on the motion to amend on October 28, 2005, and it entered an order denying the motion on November 21, 2005.

The trial court later entered an agreed order stating that the final judgment was served on November 21 for purposes of appeal. The motion for a new trial was filed on December 1, 2005.

Although this Court is authorized by Tenn. R. App. P. 2 to suspend certain rules of the Tennessee Rules of Appellate Procedure where "good cause" is demonstrated, we decline to do so in this case. The date of the "final judgment" for purposes of appeal , November 21, 2005, was more than two months past the date that the jury returned its verdict on September 1, 2005. It is clear that Plaintiffs' counsel had no difficulty in filing a motion to amend on October 3, 2005, and we see no indication that she had inadequate time in which to prepare the motion for a new trial filed on December 1, 2005. As we are not required to grant relief to "a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error[,]" Tenn. R. App. P. 36, we decline to do so here. *See* ***Cook v. Hanner***, No. M2002-01083-COA-R3-CV, 2003 WL 21170486, at *2-*3 (Tenn. Ct. App. W.S. May 20, 2003) (declining to suspend Rule 3(e) where appellant filed notice of appeal within 30 days of judgment but did not file a motion for new trial).

Because Plaintiffs' motion for new trial did not specifically state any issues regarding the jury instructions or the verdict form, these issues are considered waived on appeal.

B. Counsel's Ability to Review the Written Jury Instructions

Plaintiffs also assert that the trial court "committed reversible error by not allowing counsel to review the written jury instructions and verdict form, thereby denying [Plaintiffs] the opportunity to fully and effectively make timely objections to the jury instructions and verdict form used." Plaintiffs rely solely upon Tenn. R. Civ. P. 51.02 as the basis of their argument, which provides:

> After the judge has instructed the jury, the parties shall be given opportunity to object, out of hearing of the jury, to the content of an instruction given or to failure to give a requested instruction, but failure to make objection shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for a new trial.

A plain reading of the Rule only requires that counsel be given the "opportunity to object" to the content of the instructions. The Committee Comment to Rule 51.02 further explains:

> This Rule is the opposite of the Federal Rule insofar as requiring counsel to state objections to the charge at trial. The Committee felt that the Federal Rule places too great a burden on trial counsel and fails to take into account the difficulties of stating objections accurately *after merely hearing a charge without opportunity to see a transcript of it.* The Committee felt that the trial judge has the duty

> to charge the jury accurately, and the parties litigant should not be deprived of an opportunity to seek a new trial because of an inaccurate charge merely because counsel did not make an oral objection at the trial; such errors in the charge should be available as grounds for relief on motion for new trial or on appeal, subject to the rules regarding harmless error.

(emphasis added). This Comment contemplates that counsel will not be able to review a transcript of the jury instructions, and in order to accommodate counsel's difficulties, Rule 51.02 allows objections to be made in the motion for new trial. We find no authority, in this Rule or otherwise, for Plaintiffs' contention that a trial judge commits reversible error by not allowing counsel to review the written jury instructions.

Although Plaintiffs do not rely on it, Tenn. Code Ann. § 20-9-501 (1994) provides that:

> On the trial of all civil cases, it shall be the duty of the judge before whom the same is tried, at the request of either party, plaintiff or defendant, to reduce every word of his charge to the jury to writing, before it is delivered to the jury, and all subsequent instructions which may be asked for by the jury, or which may be given by the judge, shall, in like manner, be reduced to writing before being delivered to the jury.

When discussing the jury instructions, Plaintiffs' counsel asked the trial judge, "Will we get a copy of them before?" The judge replied, "Well I don't know whether you will or not." We question whether counsel's inquiry would be construed as a "request" that the charge be reduced to writing. Nevertheless, we have not encountered any case that has interpreted Tenn. Code Ann. § 20-9-501 as requiring a trial judge to provide the written instructions to the parties' attorneys. One court explained "[i]t is better practice for the Trial Judge to reduce his charge to writing before delivery and to carefully compare its verbiage with that of the special requests submitted by counsel so that all proper words, phrases and rules may be included." ***Davis v. Wilson***, 522 S.W.2d 872, 884 (Tenn. Ct. App. 1974). The requirements of the statute "have been fully met when the trial judge reduces 'every word of his charge to the jury to writing,' reads that written charge to them," and does not deliver a charge orally without reading it from the writing. ***Phillips v. Newport***, 28 Tenn. App. 187, 206, 187 S.W.2d 965, 972 (Tenn. Ct. App. 1945). Although the statute has been referred to as one "for the benefit of the attorneys," ***Ladd by Ladd v. Honda Motor Co., Ltd.***, 939 S.W.2d 83, 104 (Tenn. Ct. App. 1996), it has not been interpreted to require that the written version be physically provided to the jury or to the parties' counsel. *See* ***Smith v. Steele***, 44 Tenn. App. 238, 251, 313 S.W.2d 495, 501 (Tenn. Ct. App. 1956) (statute does not require the written copy to be physically delivered to the jury, which is a matter of discretion of the trial judge)[2]. The statute "merely requires

[2] Rule 51.04 of the Tennessee Rules of Civil Procedure, entitled "Written Form," provides that "If the judge elects to reduce to writing the instructions given . . . the judge shall give the jury one or more copies of the written (continued...)

that the charge in civil cases be reduced to writing, at the request of either party, before delivery to the jury." ***Runnels v. Rogers***, 596 S.W.2d 87, 91 (Tenn. 1980).

In any event, any error in the trial court's failure to provide counsel with the written versions of the instructions would be deemed harmless because counsel could have preserved any objections by raising the issues in a motion for new trial. *See* Tenn. R. Civ. P. 51.02 ("failure to make objection shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for a new trial"). The judge's decision not to provide counsel with a written copy of the instructions before he read them to the jury did not prevent her from making timely objections, therefore, we find this issue to be without merit.

C. The Amount of Attorney's Fees

Although not listed as a separate issue in their brief, Plaintiffs also question whether the trial court erred by awarding attorney's fees to Sequatchie Concrete without hearing proof of the reasonableness of those fees. The judgment order awarded a total of $18,883.85 to Sequatchie Concrete.

During closing arguments, counsel for Sequatchie Concrete addressed the interest and attorney's fees that were being sought pursuant to the job tickets, in addition to the $11,776.06 owed for the concrete and materials. He stated that the interest to date totaled $2,386.83, and the attorney's fees for the collection amounted to $4,720.96, for a total judgment of $18,883.85.[3] Sequatchie Concrete's regional manager and its safety and environmental director had testified about the rates of interest and the amount of interest accrued during trial. Also, the safety director had testified that the amount of attorney's fees would be one-third of the amount of collection plus interest. The job tickets had provided that the buyer would pay "reasonable attorney's fees" incurred for collection.

Where an attorney's fee is based upon a contractual agreement expressly providing for a reasonable fee, the award must be based upon the guidelines by which a reasonable fee is determined. ***Wilson Mgmt. Co. v. Star Distrib. Co.***, 745 S.W.2d 870, 873 (Tenn. 1988). Obviously,

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[2](...continued)
instructions . . . for use in the jury room during deliberations. After the deliberations are concluded, the written charge shall be returned to the judge." Tenn. R. Civ. P. 51.04 (2006) (emphasis added). Still, Rule 51.04 does not in any way imply that written versions must be given to attorneys.

[3] In the order overruling Plaintiffs motion to amend the judgment, the trial court referred to the additional award of $7,067.79 beyond the cost of the concrete as "for attorney's fees," but it is clear from the record that this amount was intended to encompass the interest accrued and the attorney's fees. Sequatchie Concrete also interprets the award as covering the interest and attorney's fee. We believe the reference to the award in the order denying Plaintiffs' motion to amend was a misstatement, and for purposes of our discussion we will treat $4,720.96 as the award of attorney's fees.

the burden of proof on the question of what is a reasonable fee in any case is upon the plaintiff, and plaintiff should be in a position to tender such proof. ***Id.*** However, a trial judge may fix the fees of lawyers in causes pending or which have been determined by the court, with or without expert testimony of lawyers and with or without a prima facie showing by plaintiffs of what a reasonable fee would be. ***Id.*** The trial judge may feel that the proceedings which he or she has heard have sufficiently acquainted him or her with the appropriate factors to make a proper award of an attorney's fee without proof or opinions of other lawyers. ***Kahn v. Kahn***, 756 S.W.2d 685, 696-97 (Tenn. 1988). Therefore, reversal of a fee award is not required merely because the record does not contain proof establishing the reasonableness of the fee. ***Kline v. Eyrich***, 69 S.W.3d 197, 210 (Tenn. 2002). Should a dispute arise as to the reasonableness of the fee awarded, then in the absence of any proof on the issue of reasonableness, it is *incumbent* upon the party challenging the fee to pursue the correction of that error in the trial court by insisting upon a hearing on that issue, or to convince the appellate courts that he was denied the opportunity to do so through no fault of his own. ***Id.*** (citing *Wilson Mgmt. Co.*, 745 S.W.2d at 873); ***Kahn***, 756 S.W.2d at 697. Absent a request for a hearing by the party dissatisfied by the award, a trial court is not required to entertain proof as to the reasonableness of the amount of attorney's fees awarded. ***Richards v. Richards***, No. M2003-02449-COA-R3-CV, 2005 WL 396373, at *15 (Tenn. Ct. App. W.S. Feb. 17, 2005).

In this case, Plaintiffs never insisted that Sequatchie Concrete adduce proof on the issue of the reasonableness of its attorney's fees. Plaintiffs did not object to Sequatchie Concrete's safety director testifying that the attorney's fee would equal one-third of the collection amount. Plaintiff was on notice of the amount being sought after Sequatchie Concrete's counsel specifically set out all the amounts in his closing arguments. Still, Plaintiffs did not insist on cross-examining opposing counsel or offering their own proof on the issue of the fees. Plaintiffs did not demand proof of the value of the services in any of their post-trial motions. Plaintiffs simply never requested a hearing upon the issue, so the trial court was not required to entertain proof on the issue. Plaintiffs have not alleged that they were denied the opportunity to request a hearing through no fault of their own. Having overseen the proceedings below, the trial court was capable of adjudging the value of the attorney's services. Furthermore, after reviewing the record, we conclude that the award of attorney's fees was reasonable. We find no error in the trial court's handling of this issue.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the circuit court. Costs of this appeal are taxed to Appellants, Malibu Equestrian Estate and John Shart, and their surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE